

The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SCOTT AND KATHRYN KASEBURG, et al.,)	
)	
Plaintiffs,)	No. 14-cv-00784-JCC
)	
vs.)	KING COUNTY'S MOTION TO
)	DISMISS
PORT OF SEATTLE, a municipal corporation;)	
PUGET SOUND ENERGY, INC., a Washington)	NOTE ON MOTION CALENDAR:
for profit corporation and KING COUNTY, a)	October 3, 2014
home rule charter county,)	
)	
Defendants.)	
)	

I. RELIEF REQUESTED

In this action, plaintiffs' claim broad property rights under the Trails Act, 16 U.S.C. §1247(d), to a "railbanked" railroad corridor that was formerly owned by BNSF and is now owned by King County. Their action rests on the novel legal theory that BNSF "abandoned [its] easement for railroad purposes on the surface of Plaintiffs' fee ownership," and that the Port of Seattle (Port) and King County "merely acquired a surface easement [from BNSF] for a hiking and biking trail on Plaintiffs' property with the possible reactivation of a railroad." Dkt. 1-2 at p. 52, ¶129 (First Amended Complaint). Plaintiffs' reading of the Trails Act for this unprecedented conclusion is foreclosed by the Supreme Court's holdings in the seminal railbanking case of

DEFENDANT KING COUNTY'S MOTION
TO DISMISS (14-cv-00784-JCC) - 1

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1 *Preseault v. I.C.C.*, 494 U.S. 1, 8 (1990). In *Preseault*, the Court held that the Trails Act actually
 2 operates to “prevent[] property interests from reverting under state law” to the owner of the
 3 underlying fee estate. (Emphasis added). Because plaintiffs misconstrue the Trails Act, rely on
 4 preempted state law remedies, and raise matters outside the Court’s subject matter jurisdiction,
 5 the Court should dismiss this matter under Fed. R. Civ. P. 12(c) for failure to state a claim and
 6 lack of subject matter jurisdiction.

7 **II. RELEVANT FACTS AND PROCEDURAL BACKGROUND**

8 Plaintiffs purport to own property along the railroad corridor that runs from milepost 5.0
 9 near Kenndale to milepost 10.6 at Wilburton along the Eastern shore of Lake Washington
 10 (South Rail Corridor).¹ Dkt. 1-2 at p. 6, ¶1. The South Rail Corridor is part of the Seattle
 11 Branch Line (the “Line”), a roughly 19.5 mile long railroad segment running along the eastern
 12 shore of Lake Washington between Woodinville and Renton.

13 **A. BNSF Conveys Its Property Interests in the South Rail Corridor to the Port.**

14 According to the First Amended Complaint, predecessors to BNSF acquired easements
 15 over plaintiffs’ properties in the late 1800s and the early 1900s for “railroad purposes.” *Id.* at p.
 16 6, ¶2 & p. 41, ¶92. Until mid-2008, the Line was actively used for freight rail service. *Haggart*
 17 *v. United States*, 108 Fed.Cl. 70, 75 (Fed. Cl. 2012).²

19 ¹ In accord with Fed. R. Civ. P. 12(b) & (c), King County accepts the facts as plead in the First Amended
 20 Complaint as true for purposes of this motion only. King County otherwise disputes plaintiffs’ various
 21 factual claims, including the nature of the ownership interest enjoyed by some plaintiffs, as outlined in
 22 King County’s Answer and Counterclaim. See Dkt. 18 (King County’s Answer and Counterclaim).

23 ² Plaintiffs reference and rely upon the *Haggart* matter in their complaint. As such, the Court may take
 judicial notice of the facts stated in the various *Haggart* decisions without converting King County’s
 motion into one for summary judgment. *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001) (A
 court may judicially notice “material which is properly submitted as part of the complaint” on a motion to
 dismiss without converting the motion to dismiss into a motion for summary judgment). Certain legal
 conclusions reached by the *Haggart* court, including its characterization of some of the underlying
 railroad deeds under Washington law, are not raised in this motion and are not binding on defendants,
 who were not parties to the *Haggart* case.

1 On May 12, 2008, BNSF entered into a series of agreements with the Port and King
 2 County to transfer its interests in the Line to the Port and designate King County to serve as
 3 Interim Trail Manager for “railbanking.”³ Dkt. 1-2 at pp. 44-45, ¶¶104-05. The agreements,
 4 which concern the property and contemplate a conveyance from BNSF to the Port and King
 5 County following railbanking, are attached to the First Amended Complaint. *See* Dkt. 4-1 at p. 9
 6 (Ex. C to Complaint), p. 31 (Ex. D to Complaint), & p. 73 (Ex. G to Complaint).

7 These agreements were contingent on approval from the Surface Transportation Board
 8 (STB) and the satisfaction of other conditions precedent. As successor to the Interstate
 9 Commerce Commission (ICC), the STB has exclusive and plenary authority over freight rail
 10 operations in interstate commerce, including the abandonment of rail corridors. *See* 49 U.S.C. §
 11 10903-04.

12 To obtain STB approval for interim trail use, railbanking and the transfer of BNSF’s right
 13 to restore service along the South Rail Corridor to King County, all parties to the agreement were
 14 required to actively pursue STB approval for the overall deal. Dkt. 1-2 at pp. 45-46, ¶105; Dkt.
 15 4-1 at pp. 43-44 (Ex. D to Complaint, pp. 13-14). In September 2008, BNSF filed the
 16 appropriate petition with the STB. Dkt. 4-1 at p. 1 (Ex. A to Complaint), p. 6 (Ex. B to
 17 Complaint); *see also BNSF Ry. Co. -- Abandonment Exemption -- in King Cnty., Wa*, AB-6 (Sub.
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22 ³ In response to the drastic shrinkage of the national rail transportation system during the middle decades
 23 of the 20th century, Congress in 1983 amended the National Trails System Act to create the “railbanking”
 program. The railbanking statute, 16 U.S.C. § 1247(d), authorizes state and local governments to acquire
 railroad corridors proposed for abandonment for use as recreational trails, subject to future reactivation
 for railroad use.

No. 464X), 2008 WL 3992071 (STB Sept. 8, 2008).⁴ On September 18, 2008, King County filed a request for issuance of a Notice of Interim Trail Use (NITU) in order to allow railbanking, and interim trail. Dkt. 4-1 at p. 1 (Ex. A to Complaint). Through a separate filing, King County also requested the STB's approval for the transfer of railroad reactivation rights from BNSF to the County. *King County, Washington – Verified Petition for an Exemption from 49 U.S.C. §10901*, Finance Docket No. 35148 (STB Sept. 22, 2008)

The STB, in conducting its environmental assessment of the BNSF petition, determined that the proposal would not significantly affect the quality of the human environment and therefore did not require a full environmental impact statement. *BNSF Ry. Co.--Petition for Exemption--in King Cnty., Wa*, AB-6 (Sub-No. 464X), 2008 WL 4459403 (S.T.B. Oct. 3, 2008). The Board reached this decision after noting that BNSF was “closely coordinating” its actions as part of a multi-transaction arrangement with the Port and King County, and that the Port intended that the line be railbanked under 16 U.S.C. § 1247(d) with King County as the Interim Trail Manager. *Id.* The Board also acknowledged that “the Port will determine the line’s ultimate use after seeking input from the public.” *Id.*

On October 27, 2008, the STB issued its Decision and NITU, which modified the BNSF exemption and authorized railbanking of the Line. Dkt. 4-1 at p. 6 (Ex. B to Complaint). The Board determined to issue the NITU: “Because King County’s request complies with the requirements of 49 CFR §1152.29 and BNSF is willing to negotiate for trail use, a NITU will be

⁴ This Court may take judicial notice of filings before the STB and the Board’s decisions. *Yreka W. R. Co. v. Tavares*, CIV. 2:11-1868 WBS, 2012 WL 2116500 (E.D. Cal. June 4, 2012)(citing *Burbank–Glendale–Pasadena Airport Auth. v. City of Burbank*, 136 F.3d 1360, 1364 (9th Cir.1998)). The First Amended Complaint incorrectly identifies the relevant petition as AB-6 (Sub-No 465X), filed on August 11, 2008. See Dkt. 1-2 at p. 44, ¶102. However, that petition relates to a different segment of the Line, not the South Rail Corridor. See *Id.* at ¶¶104-105. As evidenced by the exhibits to the First Amended Complaint, AB-6 (Sub-No. 464X) is the petition relevant to the South Rail Corridor at issue in this matter. See Dkt. 4-1 at p. 1 (Ex. A to Complaint), p. 6 (Ex. B. to Complaint), and p. 73 (Ex. G to Complaint).

1 issued.” *Id.* BNSF and King County were given 180 days to negotiate a trail agreement. The
 2 Board’s seven-part order contains provisions that interim trail use/railbanking is subject to both
 3 “the future restoration of rail service” and to the trail sponsor’s willingness to meet various
 4 conditions. *Id.*

5 A September 17, 2009 STB decision approved the transfer of BNSF’s right to reactivate
 6 the South Rail Corridor to King County. *King Cnty., Wa--Acquisition Exemption--BNSF Ry.*
 7 *Co.*, Fed. Carr. Cas. (CCH) ¶ 37322, 2009 WL 2979430 (S.T.B. Sept. 17, 2009). The STB
 8 recounted the plans for the line, including the South Rail Corridor:

9 BNSF, King County, and the Port of Seattle (Port) filed a joint pleading stating that the
 10 parties have agreed to a series of proposed transactions that are intended for: BNSF to
 11 enter into an interim trail use agreement with King County, the Port to acquire the real
 property and physical assets of the rail segments, and BNSF to transfer its remaining
 rights to reactivate rail service on these segments to King County.

12 *Id.* The Board indicated that its role was “to see if the trail sponsor meets the statutory and
 13 regulatory requirements to be a trail sponsor, that the railroad agrees to trail use, and that nothing
 14 occurs that would preclude a railroad’s right to reassert control over the [corridor] at some future
 15 time to revive rail service.” *Id.* It determined that there was no conflict between King County’s
 16 role as trail sponsor and its ownership of BNSF’s reactivation rights in the corridor.

17 On December 18, 2009, with regulatory approval completed for the key portions of the
 18 deal, BNSF, the Port and the County proceeded to closing. Dkt. 4-1 at p. 73 (Ex. G to
 19 Complaint). A February 4, 2010 letter from BNSF to the STB provides notice to the Board that:

20 [O]n December 18, 2009, BNSF consummated the donation of the real property and
 21 physical assets of the Rail Line to the Port of Seattle, entered into a Trail Use agreement
 22 with King County and transferred the reactivation rights with respect to the Rail Line to
 23 King County. Attached is the Verification of Susan Odom certifying compliance with the
 Board’s requirement that the transferee of the physical assets agree to comply with the
 environmental conditions imposed by the Board.

1 *Id.* The result of the agreements was to railbank the South Rail Corridor for potential future
 2 railroad use. *Haggart*, 108 Fed.Cl. at 75-76. All property rights formerly held by BNSF in the
 3 South Rail Corridor were transferred by Quit Claim Deed to the Port. Dkt. 1-2 at p. 46, ¶107;
 4 Dkt. 4-1 at 57 (Ex. F to Complaint).

5 BNSF transferred the South Rail Corridor and other portions of the Line to the Port
 6 through a Donation Agreement, which also designated King County as the Interim Trail
 7 Manager. *See* Dkt. 4-1 at p. 31, Ex. D. The Donation Agreement provides that “BNSF agrees to
 8 donate and convey to Port, and Port agrees to accept from BNSF, the Property.” *Id.* at p.3. The
 9 “Property” is broadly defined to include all of BNSF’s “right, title and interest” in the “tracts or
 10 parcels” that are associated with the South Rail Corridor.⁵ *Id.* at p.2.

11 The Port agreed to grant the County a “Public Multipurpose Easement” for the County’s
 12 use of the South Rail Corridor and Wilburton Portions. *Id.* The Donation Agreement also
 13 provided that BNSF would transfer to King County “the right and/or obligation to restore rail
 14 freight service over the Railbanked portion.” *Id.* at p.13.

15 BNSF conveyed the property to the Port with limited title warranties. The Donation
 16 Agreement states that the Port and King County were willing to accept the South Rail Corridor
 17 even though “BNSF may not hold fee simple title to the Property, [and] that BNSF’s interest in
 18 all or part of the Property, if any, may rise only to the level of an easement for railroad
 19 purposes.” *Id.* at p.7. However, BNSF affirmatively warranted that “BNSF does represent and
 20 warrant that BNSF’s ownership interest in and to the Property . . . is sufficient to permit railroad
 21 operations on the Property, including passenger railroad operations.” *Id.*

22
 23 _____
⁵ The Property also includes the “Wilburton Portion,” from milepost 10.6 north to milepost 11.25, which is not implicated in this lawsuit.

1 **B. The Port Sells Easements to PSE and Sound Transit.**

2 As the new owner of BNSF's property interests in the South Rail Corridor, in December
3 2010, the Port granted an easement along the Line to PSE to "construct, operate, maintain, repair,
4 replace, improve, remove, enlarge, and use Easement Area for one or more utility systems for
5 purposes of transmission, distribution, and sale of electricity." Dkt. 4-1 at p. 82 (Ex. H. to
6 Complaint at p. 2). The easement also granted PSE the right to install gas facilities. *Id.* The
7 PSE easement includes subsurface, surface and aerial rights. *Id.*

8 In April 2012, the Port conveyed a portion of the Line north of the South Rail Corridor to
9 Sound Transit. Dkt. 4-1 at p. 212 (Ex. I to Complaint at p. 4). It also granted a "high capacity
10 transportation easement" over the entire Line, including the South Rail Corridor. *Id.* The
11 easement acknowledged the railbanked status of the Line and allowed Sound Transit "to develop
12 and operate High Capacity Transit Facilities" along the Line. *Id.* As with the PSE easement, the
13 Sound Transit easement includes subsurface, surface and aerial rights. *Id.*

14 **C. The Port Conveys Its Property Interests in the South Rail Corridor to King**
15 **County.**

16 Pursuant to a purchase and sale agreement dated February 8, 2013, the Port transferred all
17 its remaining property interests in the South Rail Corridor to King County by quit claim deed.
18 Dkt. 4-1 at p. 133 (Ex. J to Complaint) & p. 209 (Ex. K to Complaint). As such, with regard to
19 the South Rail Corridor, King County is currently the Interim Trail Manager, the holder of the
20 right to reactivate for future railroad use, and the successor to all property rights previously held
21 by BNSF (except for the easements granted by the Port).

22 **D. Plaintiffs' Fully Compensated for Operation of the Trails Act.**

23 On February 19, 2009 – while BNSF, the Port and King County were finalizing the
property transaction – a takings case was filed against the United States seeking compensation

1 for operation of the Trails Act on the Line, including the preservation of easements along the
 2 South Rail Corridor. *Haggart v. United States*, No. 09-103L (Ct. Claims 2009). The *Haggart*
 3 case recently settled for nearly \$140 million. The terms of the takings judgment are summarized
 4 in *Haggart v. United States*, 116 Fed.Cl. 131 (Fed. Cl. 2014). Most, if not all, of the plaintiffs in
 5 the current action were also part of the plaintiffs' class in *Haggart*, or successors in interest to the
 6 properties held by those class members.

7 **III. ISSUES**

8 A. Does the Trails Act preclude plaintiffs' claim that BNSF's prior rail road
 9 easement was "abandoned" and replaced by an easement for a hiking and biking trail only with
 10 the potential for future reactivation of a railroad? Yes.

11 B. To the extent that plaintiffs seek to affect an abandonment of BNSF's prior
 12 railroad easement, do the ICCTA, the Trails Act, associated regulations and decisions of the STB
 13 preclude this Court from granting plaintiffs' requested relief? Yes.

14 **IV. AUTHORITY AND ARGUMENT**

15 **A. Judgment As A Matter of Law.**

16 A Rule 12(c) motion for judgment on the pleadings is considered utilizing the same
 17 standards applicable to a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which
 18 relief can be granted. *McGlinchy v. Shull Chem. Co.*, 845 F.2d 802, 810 (9th Cir.1988). The
 19 Court should dismiss plaintiffs' First Amended Complaint "if it is clear that no relief could be
 20 granted under any set of facts that could be proven consistent with the allegations." *McGlinchy v.*
 21 *Shull Chem. Co.*, 845 F.2d at 810 (citing *Aldabe v. Aldabe*, 616 F.2d 1089, 1093 (9th Cir.1980)).
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 23

B. The Trails Act Prevents Any “Abandonment” of BNSF’s Prior Railroad Easement Over the South Rail Corridor, Which Is Now Held By King County.

Plaintiffs’ cause of action depends entirely on misreading the Trails Act to nullify a valid, state law railroad easement.⁶ The First Amended Complaint admits that “prior to the implementation of the Trails Act and the granting of a quit claim deed to the Port, [BNSF] possessed an easement for railroad purposes” in the Line. Dkt. 1-2 at p. 52, ¶127. Because the Trails Act *preserves* such easements through railbanking and *prevents* any abandonment under state law, plaintiffs’ action should be dismissed. As successor in title to BNSF, King County now owns the railroad easement along the South Rail Corridor, which under Washington law, includes subsurface, surface and aerial rights.

1. The Trails Act Precludes Any Claim of Abandonment And Preserves the Railroad Easement Via The Railbanking Process.

Plaintiffs’ claim for quiet title and declaratory judgment rests on the incorrect proposition that the robust railroad easement held by BNSF was somehow “abandoned” and replaced by operation of the Trails Act with only an easement for a hiking and biking trail with the potential for future reactivation of a railroad. Dkt. 1-2 at pp. 52-53, ¶¶129-30. Plaintiffs’ claim that the BNSF easement was somehow “abandoned” is contrary to the purposes and provisions of the Trails Act.

The Trails Act expressly prevents the “abandonment” of any railbanked corridor. 16 U.S.C. § 1247(d). It broadly applies this stricture to “any law or rule of law,” thereby making clear that any state law abandonment of a railroad easement is a nullity. *Id.* The Trails Act states:

⁶ Although some plaintiffs have no property interest in the South Rail Corridor, for purposes of this motion only, King County will assume that BNSF enjoyed only a rail road easement over all plaintiffs’ respective properties, rather than a fee simple estate.

Consistent with the purposes of that Act, and in furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use, in the case of interim use of any established railroad rights-of-way pursuant to donation, transfer, lease, sale, or otherwise in a manner consistent with this chapter, if such interim use is subject to restoration or reconstruction for railroad purposes, *such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes.*

Id. (emphasis added).

In accord with this language, the *Preseault* decision recognizes that the explicit purposes of the Trails Act are to *expand* railroad easements for interim trail use, and *preserve*, not diminish, existing railroad easements:

Two congressional purposes are evident. First, Congress intended to “encourage the development of additional trails” and to “assist recreation[al] users by providing opportunities for trail use on an interim basis.” H.R.Rep., at 8, 9; S.Rep., at 9, 10 (same), U.S.Code Cong. & Admin.News 1983, p. 119; see also 16 U.S.C. § 1241(a) (Trails Act “promote [s] the preservation of, public access to, travel within, and enjoyment and appreciation of the open-air, outdoor areas and historic resources of the Nation”). Second, Congress intended “to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use.” H.R.Rep., at 8; S.Rep., at 9, U.S.Code Cong. & Admin.News 1983, p. 119; see also 16 U.S.C. § 1247(d). These are valid congressional objectives to which the Amendments are reasonably adapted.

Preseault, 494 U.S. at 17-18. See also *Friends of the E. Lake Sammamish Trail v. City of Sammamish*, 361 F.Supp.2d 1260, 1274 (W.D. Wash. 2005)(“The purpose of the Rails to Trails Act is not to encourage the development of recreational trails near inactive railroad rights of way—it is to encourage the transition of these railbeds into recreational trails, *and to preserve the right-of-way for possible future railroad reactivation.*”).

The Supreme Court in *Preseault* laid out how the Trails Act accomplishes these goals. It explained that “many railroads do not own their rights-of-way outright but rather hold them under easements or similar property interests.” *Preseault*, 494 U.S. at 8. Further, “[w]hile the terms of these easements and applicable state law vary, frequently the easements provide that the

1 property reverts to the abutting landowner upon abandonment of rail operations.” *Id.* Congress
 2 prevented such abandonment from occurring when a corridor is railbanked by providing that
 3 such “interim trail use ‘shall not be treated, for any purposes of any law or rule of law, as an
 4 abandonment of the use of such rights-of-way for railroad purposes.’” *Id.* (quoting 16 U.S.C. §
 5 1247(d)). Congress thereby “prevented property interests from reverting under state law” when
 6 railroad use ceases and a corridor is railbanked. *Id.*

7 The Supreme Court further explained that the Trails Act “is the culmination of
 8 congressional efforts to *preserve* shrinking rail trackage by converting unused rights-of-way to
 9 recreational trails.” 494 U.S. at 5 (emphasis added). The Trails Act accomplishes this goal of
 10 preserving rail capacity through railbanking, which authorizes state and local governments to
 11 acquire railroad corridors proposed for abandonment for use as recreational trails, subject to
 12 future reactivation for railroad use. 16 U.S.C. § 1247(d).

13 In response to a railroad’s notice of intent to abandon service, a state or local government
 14 or qualified private organization may file a “Statement of Willingness To Assume Financial
 15 Responsibility” with the STB. 49 CFR § 1152.29(a). If the railroad agrees to consider
 16 railbanking, the STB issues a NITU, stating that railbanking is authorized for the corridor at
 17 issue. *Id.* § 1152.29(c). “If a state, political subdivision, or qualified private organization is
 18 prepared to assume full responsibility for the management of such rights-of-way, . . . [then] the
 19 Commission ... *shall not permit abandonment* or discontinuance inconsistent or disruptive of
 20 such [trail] use.” 16 U.S.C. § 1247(d)(emphasis added). A railroad corridor is thus railbanked
 21 rather than abandoned. A railbanked corridor remains part of the national rail transportation
 22 system subject to the jurisdiction of the STB. *Caldwell v. United States*, 391 F.3d 1226, 1229
 23

(Fed. Cir. 2004); *Friends of the East Lake Sammamish Trail v. City of Sammamish*, 361 F. Supp. 2d 1260, 1273-74 (W.D. Wash. 2005).

Counter to plaintiffs' position, railbanking and "conversion from railroad to trail use blocks the abandonment of the corridor even though the conditions for abandonment are otherwise met." *National Association of Reversionary Property Owners v. STB*, 158 F.3d 135, 138 (D.C. Cir. 1998) (emphasis added). "[S]uch interim use *shall not be treated for purposes of any law or rule of law, as an abandonment* of the use of [the railbanked] rights-of-way for railroad purposes." *Preseault*, 494 U.S. at 6 (emphasis added).

Because the Trails Act operates to preserve and protect the South Rail Corridor, plaintiffs lack any viable legal authority to support their claim that the BNSF railroad easement was somehow "abandoned" and/or replaced by a recreational trail for hiking and biking with a possible future railroad. The Trails Act precludes operation of any state law that might otherwise "provide that the property reverts to the abutting landowner upon abandonment of rail operations." *Preseault*, 494 U.S. at 6. Federal law "preempts state law on the question of abandonment" because "the ICC's determination of abandonment is plenary, pervasive, and exclusive of state law." *Grantwood Vill. v. Missouri Pac. R. Co.*, 95 F.3d 654, 658 (8th Cir. 1996).

Indeed, plaintiffs' theory would undermine the purposes of the Trails Act by leaving the South Rail Corridor without the railroad easement rights necessary for viable future railroad operations. Absent preservation of BNSF's former property rights along the South Rail Corridor, plaintiffs may well seek to use the corridor for their own purposes – including the construction of buildings and other permanent facilities that would impede the possible return of railroad operations – so long as room was left for a narrow ribbon of public trail. Plaintiffs'

theory also leaves many unanswerable questions about the nature, width and scope of the interim trail by replacing a well-defined railroad easement with an unwritten and undefined federal “easement” for trail use. Complete preservation of the rail corridor as intended by Congress, with its associated property rights, avoids these problems and the follow-up litigation that plaintiffs’ position would spawn.

Because plaintiffs’ rely on an interpretation of the Trails Act that is contrary to *Preseault* and the Act’s language, they have failed to state a claim for which relief may be granted. The Court should dismiss this action. *See also Glosemeyer v. Missouri-Kansas-Texas R.R.*, 879 F.2d 316, 319 (8th Cir. 1989), *cert denied*, 494 U.S. 1003 (1990) (“The key finding of [§1247(d)] is that interim use of a railroad right-of-way of trail use, when the route itself remains intact for future railroad purposes, shall not constitute an abandonment of such rights-of-way for railroad purposes.”).

2. King County Now Owns BNSF’s Robust State Law Railroad Easement.

Because BNSF’s prior state law railroad easement was not abandoned, it is now owned by King County (subject to the PSE and Sound Transit easements conveyed by the Port). In accord with Washington law, railroad easements provide exclusive control within the easement boundaries, including subsurface, surface and aerial rights.

The United States Supreme Court has noted that “[i]t must be admitted that a railroad company has the exclusive control of all the land within the lines of its roadway.” *Grand Trunk Railroad Co. v. Richardson*, 91 U.S. 454 (1875). The Washington Supreme Court has similarly recognized the robust nature of a railroad easement:

Many of the courts say that the nature of the right of way purchased or condemned by a railroad company is more than a mere easement. It has been designated as a qualified or determinable fee, although it is not very important what it is called. It is taken for a

specific purpose, to be held so long as devoted to that purpose. *A railroad right of way is a very substantial thing. It is more than a mere right of passage. It is more than an easement.* *Abercrombie v. Simmons, supra, citing Western Union Tel. Co. v. Pennsylvania R. Co.*, 195 U. S. 540, 25 S. Ct. 133, 49 L. Ed. 312.

Morsbach v. Thurston Cnty., 152 Wash. 562, 568-69, 278 P. 686, 688 (1929) (emphasis added).

The owner of the railroad easement is “entitled to the exclusive use, possession, and control of the land, and the owner of the fee has no right to use, occupy, or interfere with the same in any manner whatever.” *N. Pac. Ry. Co. v. Tacoma Junk Co.*, 138 Wash. 1, 6, 244 P. 117 (1926) (quoting *Roby v. N.Y. Cent. & Hudson River R. Co.*, 142 N.Y. 176, 180, 36 N.E. 1053 (1894)).

In summarizing the broad nature of railroad easements in Washington, the Washington Court of Appeals has held that:

A railroad right-of-way is a very substantial thing, more than a mere right of passage and more than an ordinary easement. *Morsbach*, 152 Wash. at 569, 278 P. 686 (citing *W. Union Tel. Co. v. Pa. R.R.*, 195 U.S. 540, 570, 25 S.Ct. 133, 49 L.Ed. 312 (1904) and *Abercrombie v. Simmons*, 71 Kan. 538, 81 P. 208, 211 (1905)); *State ex rel. N. Coast Ry. v. N. Pac. Ry.*, 49 Wash. 78, 84, 94 P. 907 (1908). It is often likened to a determinable fee. *See, e.g., Morsbach*, 152 Wash. at 568, 278 P. 686; *Brown*, 130 Wash.2d at 439, 924 P.2d 908. It is an easement with the substantiality of a fee and the attributes of a fee, perpetuity and exclusive use and possession; also the remedies of a fee. *Morsbach*, 152 Wash. at 569, 278 P. 686. This “fee-like” estate is frequently granted in terms usually associated with the grant of a fee simple. *See, e.g., Morsbach*, 152 Wash. at 569-70, 278 P. 686.

Hanson Indus., Inc. v. Cnty. of Spokane, 114 Wn. App. 523, 528, 58 P.3d 910, 914 (2002), review denied 149 Wn.2d 1028 (2003). *See also* Danaya C. Wright and Jeffrey M. Hester, *Pipes, Wires, and Bicycles: Rails-to-Trails, Utility Licenses, and the Shifting Scope of Railroad Easements from the Nineteenth to the Twenty-First Centuries*, 27 Ecology L.Q. 351, 387-88 (2000)(courts have “consistently recognized that the easement is bigger, more extensive, and exclusive as against the fee owner than most private easements and public utility easements”).

A Washington railroad easement also includes subsurface, surface, and aerial rights within the corridor. The Washington Court of Appeals addressed this question in *Kershaw*

1 *Sunnyside Ranches, Inc. v. Yakima Interurban Lines Ass'n*, 121 Wn. App. 714, 735, 91 P.3d 104,
 2 116 (2004) *aff'd in part, rev'd in part*, 156 Wn.2d 253, 126 P.3d 16 (2006).⁷ Noting that a
 3 railroad easement is “more than a mere right of passage,” the Court of Appeals adopted the
 4 majority view that:

5 The railroad right-of-way also includes the incidental below ground uses of its right-of-
 6 way. . .

7 The test for determining right-of-way uses is whether the subject use is inconsistent with
 8 the purposes for which the right-of-way was granted. *United States v. Union Pacific R.R.*,
 9 353 U.S. 112, 77 S.Ct. 685, 1 L.Ed.2d 693 (1957). In *Union Pacific*, the Supreme Court
 stated the railroad right-of-way uses which are incidental to, or consequential upon, those
 things which the legislature has authorized, ought not, unless specifically prohibited, to
 be held by judicial construction to be ultra vires. *Id.*

10 This Court finds the right-of-way surface includes the non-mineral topsoil that would be
 11 occupied by a buried fiber optic line, and the fiber optic cable is an authorized incidental
 use which is not inconsistent with railroad uses and does not burden the subservient estate
 retained by the Plaintiff.

12 *Kershaw*, 121 Wn.App. at 736 (*quoting Mellon v. Southern Pacific Transport Co.*, 750 F.Supp.
 13 226, 230–31 (W.D. Tex. 1990). It is also recognized that “[r]ailroads generally have exclusive
 14 air rights over the railroad corridors” created by easement. Wright and Hester, *supra* at 407
 15 (*cited in Kershaw*, 156 Wn.2d at 273, *Rasmussen*, 299 F.3d at 1088).

16 The inclusion of subsurface, surface and aerial rights in a railroad easement is also
 17 consistent with Washington’s approach to road easements. Washington courts analogize railroad
 18 easements to public highway easements. *Washington Sec. & Inv. Corp. v. Horse Heaven*
 19 *Heights, Inc.*, 132 Wn. App. 188, 194, 130 P.3d 880, 883 (2006); *see also* RCW 80.36.050
 20 (defining railroads as “post roads.”). Easements granted for public highways allow not only the
 21 primary purpose of public travel, but also “numerous other purposes for which the public ways
 22

23

⁷ The Washington Supreme Court decided the case on other grounds and neither addressed, nor altered
the lower appellate court’s discussion regarding the scope of railroad easements.

1 way be used, such as for water mains, gas pipes, telephone and telegraph lines, etc.” which are
 2 “termed secondary uses and are subordinate to, and permissible only when not inconsistent with,
 3 the primary object of the highways.” *State ex rel. York v. Bd. of Comm'rs of Walla Walla Cnty.*,
 4 28 Wn.2d 891, 898, 184 P.2d 577, 582 (1947).

5 As a matter of law, plaintiffs have no viable claim to quiet title in the broad railroad
 6 easement rights held by BNSF and later purchased by the Port and King County. By operation
 7 of the Trails Act, BNSF’s prior easement over the South Rail Corridor was preserved against any
 8 abandonment claim. Like BNSF before it, King County owns a railroad easement that includes
 9 fence-to-fence subsurface, surface and aerial rights along the corridor. Plaintiff’s quiet title and
 10 declaratory judgment action against King County should be dismissed.

11 **C. Federal Law Precludes Plaintiffs’ Action.**

12 **1. Plaintiffs Are Barred From Collaterally Attacking the STB’s NITU** 13 **Order.**

14 Through its October 27, 2008 NITU Order, the STB decided to prohibit abandonment
 15 and preserve BNSF’s railroad easement by both railbanking the South Rail Corridor and
 16 allowing for interim trail use. Because plaintiffs seek to effectively undo the STB’s work and
 17 cause an abandonment of the railroad easement, their action represents an attempted collateral
 18 attack against the STB’s order that falls outside the jurisdiction of this Court.

19 A District Court lacks jurisdiction to review an STB order. Under the Hobbs Act, 28
 20 U.S.C. § 2321(a), the United States Court of Appeals has sole jurisdiction to review decisions of
 21 the STB: “a proceeding to enjoin or suspend, in whole or in part, a rule, regulation or order of
 22 the Surface Transportation Board shall be brought in the court of appeals, as provided by and in
 23 the manner prescribed in chapter 158 of this title.” 28 U.S.C. § 2321(a). Chapter 158 provides
 that the Court of Appeals “has *exclusive jurisdiction* to enjoin, set aside, suspend . . . or to

determine the validity of . . . all rules, regulations, or final orders” of the STB. *Id.* § 2342(5) (emphasis added).

The STB ordered railbanking and interim trail use, thereby indefinitely postponing abandonment of the railroad easement along the South Rail Corridor. 16 U.S.C. 1247(d); 49 C.F.R. 1152.29(d)(1). Plaintiffs’ quiet title action, if successful, would effectively revise the STB’s orders to cause an abandonment of BNSF’s prior railroad easement and compromise the ability to return a railroad to the corridor.

A quiet title action “is in essence a collateral attack on the ICC’s order authorizing interim trail use on the right-of-way.” *Grantwood Vill. v. Missouri Pac. R. Co.*, 95 F.3d 654, 657 (8th Cir. 1996). Where the “practical effect” of a lawsuit is review of the STB’s NITU order, the District Court has no jurisdiction and must dismiss the action.⁸ *Dave v. Rails-to-Trails Conservancy*, 79 F.3d 940, 942 (9th Cir. 1996); *Grantwood Village*, 95 F.3d at 658. *See also Ballard Terminal R. Co., LLC v. City of Kirkland*, C13-586MJP, 2013 WL 1990872 (W.D. Wash. May 13, 2013)(District Court lacks subject matter jurisdiction to hear collateral attack against STB NITU).

2. Any State Law Remedies That Would Cause An Abandonment of the Rail Corridor Are Pre-Empted by the ICCTA, the Trails Act and Associated Federal Regulations.

By seeking to quiet title in BNSF’s former railroad easement and declare it “abandoned,” plaintiffs attempt to use state law remedies that are plainly preempted by operation of the ICCTA, the Trails Act, and associated STB regulations. Plaintiffs’ have failed to state a claim

⁸ If plaintiffs disagreed with the STB’s NITU order favoring preservation and trail use, their sole option was to seek review by the Court of Appeals within the 60 day period provided by the Hobbs Act. Because the appeal period is long expired and plaintiffs failed to make their abandonment arguments before the STB, plaintiffs have waived their arguments.

1 upon which relief may be granted because state law remedies cannot operate to vitiate federal
2 law.

3 Federal regulation of railroads under the ICCTA “has been recognized as ‘among the
4 most pervasive and comprehensive of federal regulatory schemes.’” *City of Auburn v. United*
5 *States*, 154 F.3d 1025, 1029 (9th Cir. 1998) (quoting *Chicago & N.W. Transp. v. Kalo Brick &*
6 *Tile Co.*, 450 U.S. 311, 318 (1981)). The ICCTA provides that:

7 (b) *The jurisdiction of the [STB] over –*

8 (1) *transportation by rail carriers and the remedies provided in this part* [49
9 U.S.C. §§ 10101, *et seq.*] with respect to rates classifications, rules (including car
10 service, interchange, and other operating rules), practices, routes, services, and
11 facilities of such carriers; *and*

12 (2) The construction, acquisition, operation, *abandonment*, or discontinuance of
13 spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are
14 located, or intended to be located, entirely in one state

15 is exclusive. Except as otherwise provided in this part, *the remedies provided under this*
16 *part with respect to regulation of rail transportation are exclusive and preempt the*
17 *remedies provided under Federal or State law.*

18 49 U.S.C. 10501(b) (emphasis added).

19 Due to federal preemption, plaintiffs cannot rely on the state law mechanisms of quiet
20 title and declaratory judgment to limit or reduce the railroad easement over the South Rail
21 Corridor. “The preemption doctrine is a corollary of the Supremacy Clause of the United States
22 Constitution, and in general provides that any municipal law that is inconsistent with federal law
23 is without effect.” *Friends of the E. Lake Sammamish Trail v. City of Sammamish*, 361
F.Supp.2d 1260, 1273 (W.D. Wash. 2005). Since *McCulloch v. Maryland*, 17 U.S. 316 (1819),
it has been well settled that state law that conflicts with federal law is “without effect.” *Cipollone*
v. Liggett Group, Inc., 505 U.S. 504, 516, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992).

1 Here, the ICCTA and the Trails Act preempt the application of quiet title and declaratory
 2 judgment causes of action to either active, or railbanked corridors. In *City of Auburn*, the Ninth
 3 Circuit rejected efforts to apply state and local environmental regulations to a railroad corridor:

4 We believe the congressional intent to preempt this kind of state and local regulation of
 5 rail lines is explicit in the plain language of the ICCTA and the statutory framework
 6 surrounding it. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486, 116 S.Ct. 2240, 135
 7 L.Ed.2d 700 (1996). Because congressional intent is clear, and the preemption of rail
 8 activity is a valid exercise of congressional power under the Commerce Clause, we affirm
 9 the STB's finding of federal preemption.

10 *City of Auburn*, 154 F.3d at 1031 (footnotes omitted).

11 Given the preemption of local regulatory efforts, it follows that state law remedies like
 12 quiet title – which operate to reduce the scope of a railbanked corridor, or eliminate it altogether
 13 – should similarly be preempted by federal law. *See, e.g., 14500 Limited LLC—Petition for*
 14 *Declaratory Order*, STB Docket No. FD 35788 (June 5, 2014) (ICCTA categorically preempts
 15 property owner's adverse possession and exclusive prescriptive easement claims because those
 16 claims would deprive a railroad of its property and the deprivation would affect rail
 17 transportation); *Ao-Zhou—Petition for Declaratory Order*, STB Docket No. FD 35539, Slip Op.
 18 at p.6 (June 6, 2012) (ICCTA categorically preempted petitioners' adverse possession claim
 19 under Washington State law to quiet title to a strip of land along the South Rail Corridor because
 20 claim represented "regulation that has the effect of preventing or unreasonably interfering with
 21 railroad transportation[.]"). *See also City of Lincoln v. STB*, 414 F.3d 858, 862 (8th Cir. 2005)
 22 (denying petition to review STB order that dismissed city's eminent domain suit as categorically
 23 preempted by ICCTA due to potential interference with rail transportation caused by a
 "permanent action"). Consistent with the "broad reading of Congress' preemption intent"

1 recognized in *City of Auburn v. United States*, 154 F.3d 1025, 1030 (9th Cir.1998), this Court
 2 should dismiss plaintiffs' action.⁹

3 **3. Any Abandonment of the South Rail Corridor Lies within the STB's**
 4 **Exclusive Jurisdiction and Outside the Jurisdiction of this Court.**

5 Even if plaintiffs did have a valid cause of action under state or federal law to decrease
 6 the scope of the prior BNSF railroad easement, their case should nonetheless be dismissed
 7 because this Court lacks subject matter jurisdiction to order any abandonment. The STB has
 8 exclusive and plenary authority over freight rail operations in interstate commerce under the
 9 ICCTA. *See* 49 U.S.C. § 10903-04; *See also Colorado v. United States*, 271 U.S. 153 (1926).
 10 There can be no "abandonment" of a rail corridor without prior authorization by the STB. *Philips*
 11 *Company v. Denver & Rio Grande Western Railroad*, 97 F.3d 1375 (10th Cir. 1996).

12 Federal law defines the STB as the sole appropriate forum for any abandonment of the
 13 South Rail Corridor. "It is therefore clear that railbanked corridors remain part of the national
 14 rail transportation system subject to the jurisdiction of the STB." *Friends of the E. Lake*
 15 *Sammamish Trail v. City of Sammamish*, 361 F.Supp.2d 1260, 1273-74 (W.D. Wash. 2005). The
 16 STB is "the only entity that could authorize any *permanent* use of the right-of-way" by plaintiffs.
 17 *Palmetto Conservation Foundation v. H.J. Smith*, 642 F.Supp.2d 518, 525, 528 (S. Car. 2009).
 18 Because the STB has exclusive jurisdiction over abandonments, the Court should dismiss
 19 plaintiffs' action.

20 ⁹ In discussing available remedies, the STB has noted that the options available to landowners who
 21 believe they have a state-law property interest in a railbanked railroad line is to either "ask the trail
 22 sponsor to vacate the NITU pertaining to that portion of the [line], thereby permitting immediate
 23 abandonment of the involved property; or to bring a takings case seeking just compensation under the
 Tucker Act [28 U.S.C. §1491(a)]." *Ao-Zhou*, STB Docket No, FD 35539 at 7 n.9. To the extent that
 plaintiffs brought and settled their takings case, they have already received all the remedy allowed by the
 ICCTA, the Trails Act, and associated regulations. *See also 14500 Limited LLC*, STB Docket No, 35788,
 Slip Op. at 6 ("federal law does not provide [plaintiff] with an alternative remedy that would allow it to
 possess [defendant's] property. This result is consistent with the strong federal policy in favor of
 retaining rail property in the national rail network, where possible.").

1 **V. CONCLUSION**

2 For the foregoing reasons, the Court should grant King County's motion to dismiss.

3
4 DATED this 11th day of September, 2014 at Seattle, Washington.

5
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DECLARATION OF FILING AND SERVICE

I hereby certify that on September 11, 2014, I electronically filed the foregoing document(s) with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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I declare under penalty of perjury under the laws of the United States and the State of Washington that the foregoing is true and correct.

DATED this 11th day of September, 2014 at Seattle, Washington.

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